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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 449

BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 262, SAM NANCE, WILLIAM MORGANSON, CHARLEY MEYER AND E. W. HOLBROOK.

Petitioners,

vs.

W. L. GAZZAM,

Respondent.

Reply of Petitioners.

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vs.

W. L. GAZZAM,

Respondent.

REPLY OF PETITIONERS.

The Issue of this Case.

There is no basis for disagreement in this case as to the facts and the issue involved. The only claim of error of facts (Brief, p. 7), is that petitioners were in error in saying, on pages 13 and 31 that the hotel's manager was chairman of a meeting, whereas she made the plans for the meeting and acted as chairman of the employees after the withdrawal of representatives of the hotel and of the union. Prior to that she only arranged and attended the meeting, (Tr. 84), which was in part presided over by a union leader as a "semi-chairman" (Tr. 101).

With reference to Respondent's Statement (p. 20) regarding Petitioners' error (p. 28) in saying that *Roth* v. *Local Union,* 216 Ind. 363 (1939) did not refer to freedom of speech, it is sufficient to repeat that the opinion of the Supreme Court of Indiana was directly contrary to the opinion of this Court in the *Swing* case (1941) as to employer-employee relations, and was not based on freedom of speech. Such freedom although referred to is not relied upon in its opinion, and this is stated by Petitioners.

As agreed by respondent, the picketing consisted of a single picket, and "the picketing was entirely peaceful" (Respondent's Brief, p. 9). It was also very irregular in time (Tr. p. 57).

It is also agreed that "picketing for the purpose of compelling an employer or any one else to do an unlawful act is not a lawful exercise of the right of free speech and may be enjoined". (Respondent's Brief, p. 14). An act may be unlawful, whether criminal or civil.

The question at issue, without disagreement, is that as to alleged unlawfulness of picketing to obtain union membership by new employees of the hotel and the representation of all employees by the union (Respondent's Brief, pp. 11, 27, 31). That the absence of an employer-employee relationship between the union and the employer does not create unlawfulness is fully admitted, upon the basis of *A. F. of L.* v. *Swing,* 312 U. S. 321 (1941). (Respondent's Brief, pp. 28-31).

Properly assuming that picketing to compel an unlawful act is not within freedom of speech or of the press (Brief, 28), Respondent contends that picketing in an effort to persuade an employer to unionize his employees is unlawful (Respondent's Brief, 28). This is the only legal issue in this case. It involves every industry and every state, and federal policy as well.

Respondent's Issue.

The issue of the present case as presented by Respondent is that an unlawful objective is shown by the decree enjoining the defendants and each of them "from endeavoring to compel plaintiff to coerce his employees to join the defendant union or to designate defendant union as their representative for collective bargaining", (Respondent's Brief, pp. 30-31), (1) "by picketing," (2) "by boycotting," whether directly or indirectly, (3) "by urging or persuading others to withhold their patronage" or "to refuse to contract, deal with or make deliveries to plaintiff" (Tr. 39).

In support of Respondent's position that an effort of the union to influence the employer with respect to his employees is an unlawful objective, reference is made to the Wagner Act (29 U.S.C.A. sec. 158) with a statement that the State of Washington has come into harmony with national policy. (Respondent's Brief, pp. 16-17).

The policy of the Wagner Act is in favor of, and not in opposition to, organizational activities of unions. Attention may also be called to the fact that Sections 8 (3), 9 (a) and 9 (b) of the Wagner Act find basis in collective bargaining units which may be craft units, and are determined by the National Labor Relations Board. *May Department Stores Company* v. *National Labor Relations Board,* 326 U. S. 376, 380 (1945) (29 U.S.C.A. Secs. 158 (3); 159 (a), 159 (b)). There can be nothing unlawful in a union's determination that employees engaged in the same work should have the same bargaining agent and should be represented by the same craft union. *Case Co.* v. *National Labor Relations Board,* 321 U. S. 322 (1944). The *Tri-City* case (257 U. S. 184) sufficiently establishes extension beyond one shop. The activities of the union here at issue were within federal approval.

Respondent, in his argument that an effort to influence the employer constitutes an unlawful objective, says that the *Swing* case furnishes no precedent in the present case. In that case this Court explicitly said that free communication cannot be denied to the workers "in a dispute with an employer, even though they are not in his employ", and it is true that in that case both the employer and his employees joined together in the same suit. The effort to control both the employer and his employees is more obvious in that case than in this.

The case of *Gibony* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949) is relied upon by Respondent (Brief, 32-35). In that case the Court did not disapprove peaceful picketing, but made its validity depend upon the facts of the case.

But free speech properly employed may bring gain or loss; and there is no properly employed peaceful picketing without loss to employer and to labor. Some loss must have occurred although this Court sustained peaceful picketing in *Thornhill* v. *State of Alabama*, 310 U. S. 88 (1940); *Carlson* v. *State of California*, 310 U. S. 106 (1940); *Bakery & Pastry Drivers* v. *Wohl*, 315 U. S. 769 (1942); and *American Federation of Labor* v. *Swing*, 312 U. S. 321 (1941). Similar transactions by employers may and do occasion loss to labor.

Respondent agrees that peaceful picketing may be employed for any lawful objective (Respondent's Brief, p. 31), and this Court, in *American Federation of Labor* v. *Swing*, 312 U. S. 321 (1941), has sustained peaceful picketing directed against an employer and his employees who were united against the union as in the present case.

The sole contention of the Respondent is that it is unlawful for the union to bring pressure upon the employer in order to have him influence his employees to become

associated with the union. A contrary view by this Court is found both in the *Swing* and *Wohl* cases, and in the earlier case of *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468 (1937), this court saying, through Mr. Justice Brandeis, in the *Senn* case, p. 481: "Because his action was harmful, the fact that none of Senn's employees was a union member, or sought the union's aid, is immaterial."

Absence of Unlawful Act.

The respondent's argument centers upon the contention that the petitioning union attempted to compel the respondent to coerce his men to join the union, that such coercion was unlawful, and, consequently, that the picketing, employed by the union was illegal, since it was designed to attain an unlawful end. This contention is fallacious because it attempts to reach the desired conclusion of unlawfulness upon the basis of two non-existent, yet indispensable, premises. First, the request of the union that the respondent pay his employees union wages and recognize the union as the collective bargaining agent of his employees was a lawful and not an unlawful labor objective, according to the decisions of this Court; and second, peaceful picketing to attain a legitimate labor objective is lawful. Moreover, the respondent's contention fails to mention and to take into account the most important, decisive and, actually, the only purpose for which the picketing was carried out—the informing of the public of the existence of a labor dispute.

The respondent argues that each state has the right to declare certain conduct unlawful; that the State of Washington has done so in the present case with respect to the objectives sought by the union; that the picketing was only a means to reach the objective declared unlawful by the

State of Washington and, therefore, that the picketing could be rightfully enjoined. The seeming simplicity of this argument is misleading. If freedom and liberties, guaranteed by the Federal Constitution, are involved, a state does not possess the unrestricted right, at its pleasure and discretion, to declare any conduct unlawful, regardless of whether constitutionally protected liberties are there abridged or not. It may declare conduct unlawful only if such declaration does not conflict with constitutionally guaranteed rights. Thus, much of the constitutional history of the United States is filled with cases dealing with the extent to which states may go in declaring conduct unlawful without infringing upon constitutional liberties. *Thornhill* v. *State of Alabama,* 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940), in which a statute forbade the loitering about the premises or place of business of any other person; *Lovell* v. *City of Griffin,* 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938), where a statute prohibited the distribution of handbills without a permit; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936), where a statute imposed a license tax upon publications engaged in selling advertising space, are but a few examples, taken at random from a multitude of cases, where states had attempted to declare conduct unlawful, yet had run afoul federal constitutional guarantees.

In the instant case, too, it is asserted that the State of Washington had the right to declare the petitioners' conduct unlawful. The respondent declares emphatically (Resp. Brief p. 23) that he never contended "that picketing in the absence of an employer-employee relationship is unlawful *per se,* nor does he contend that picketing for the purpose of unionization is necessarily subject to injunction". But, he contends that the only conduct which the injunction

sought to prohibit in the instant case was conduct of the union attempting to compel respondent to coerce his employees.

Apart from the fact that only the State Supreme Court's opinion is controlling, and not the individual statements of the respondent, the decisive point remains that the State Supreme Court deemed the picketing in the instant case coercive only because of the lack of a direct employer-employee relationship between the picketing union men and the respondent. This is most clearly demonstrated by the fact that the Court expressly overruled two previous decisions rendered by it (*O'Neil* v. *Building Service Employees International Union, Local No. 6,* 9 Wash. 2d 507, 115 P. 2d 662 (1941), and *S and W Fine Foods, Inc.* v. *Retail Delivery Drivers Union, Local No. 353,* 11 Wash. 2d 262, 118 P. 2d 962 (1941)), which had declared, in accordance with the case of *American Federation of Labor* v. *Swing,* 312 U. S. 321, that peaceful picketing, regardless of the absence of a direct employer-employee dispute, could not be deemed coercive but was protected by the right of freedom of speech, whatever the common law or the provisions of an anti-injunction act of a state might be. This is particularly well brought out in the *S and W Fine Foods* case, where the State Supreme Court stated the issue of the case as follows:

> "In the case at bar, the principal question presented is whether the right to peacefully picket the plant of an employer is protected by the first and fourteenth amendments to the Federal constitution, *where there is no employer-employee relationship existing between the employer picketed and the members of the union involved in the controversy.*" (Emphasis supplied).

If these two cases, which were based solely upon the question of legality of union activities in the absence of a direct employer-employee relationship, had no bearing

upon the present case, why was it necessary for the State Supreme Court to expressly overrule them? The answer to this question is, of course, obvious. Both these cases had recognized that lack of a direct employer-employee relationship did not authorize a state to consider activities of an outside union directed against an employer as coercive and unlawful.

The fact that only the absence of a direct employer-employee relationship prompted the State Supreme Court to declare the union conduct coercive, is also corroborated by a reading of the State Supreme Court's opinion. Such reading will reveal an analysis by the State Supreme Court of all decisions in labor cases rendered by it since 1935, the analysis being based upon the sole criterion whether in the various cases reviewed a direct employer-employee relationship was in existence or not. Why this emphasis upon the employer-employee relationship, if it had no bearing upon the present case, as the respondent asserts?

Keeping these factors in mind, it is clear that this Court is presented with exactly the same situation as in the *Swing* case—the assertion of a state that it has the right to outlaw peaceful picketing by union men who are not employed by the employer against whom the picketing is directed. In the *Swing* case this Court declared that "such a ban of free communication is inconsistent with the guarantee of freedom of speech." It is respectfully submitted that the same result should be reached in the present case.

There is another important factor which shows that absence of the direct employer-employee relationship was the only reason which motivated the Supreme Court of the State of Washington to call the union conduct coercive—the facts in the instant case did not warrant a finding of coercion. It is true that this Court will, in general, not make an independent valuation of the facts of a case as

found by a state court. However, this Court will deviate from that principle if the determination of the facts by a state court is of such a nature as to be "without warrant" so as to amount to "a palpable evasion" of constitutional guarantees. ". . . it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality." *(Milk Wagon Drivers Union of Chicago, Local 753* v. *Meadowmoor Dairies,* 312 U. S. 287, 293, 61 S. Ct. 552, 85 L. Ed. 836, 132 A.L.R. 1200). Hence, a look at the facts viewed under the aspect of eventual coercion is warranted.

When the union submitted its first proposal for an agreement, the respondent declined to accept it. No understanding could be reached in the ensuing period. When a majority of nine employees out of a number of eleven who participated in a meeting [the total number of employees being fifteen] decided in a vote taken by the manager of the hotel not to join the union, the union members began to picket respondent's place peacefully and intermittently. *It might be mentioned in this connection with respect to the averred neutrality of the respondent, that the vote of the employees whether they desired to join the union or not, was taken by the hotel manager, who showed her "impartiality" by telling the union representatives to get off the hotel premises: (Record 85).* Two days after the picketing had begun, a labor conciliator from the Washington State Department of Labor and Industries called a meeting of the parties to effect a settlement. (Rec. 106). The union representative discussed working conditions, wages, and sick leave provisions, yet the respondent's representative avoided any questions in this respect and was intentionally vague without submitting any counter-proposal to the union. (Rec.

106). It was finally agreed that respondent's representative would take up the matter again with the respondent and give an answer within five days (Rec. 107). In accordance with that agreement, the respondent's attorney wrote a letter to the union (Exh. E, Rec. 107), in which he declared respondent's willingness to continue negotiations with the union, but declined to sign the type of contract as proposed by the union, which would in his opinion force the employees to join the union. The letter concluded with the following statement, directed to the union: "If you have any other type of contract which would not force such a result, we will be glad to include such other form of contract in our negotiations looking to a satisfactory solution". The union, thereupon, in reliance upon respondent's statement worked out a new proposal which provided that, in compliance with respondent's wishes, existing employees should not be required to become union members, that only new employees should join the union, but that wages, hours and working conditions of union employees should be applied to non-union employees (Rec. 14). Respondent's answer to the new proposal was not a continuation of negotiations as promised in his letter, but a suit for an injunction and damages. (Rec. 1; 26). Not only this, but at the trial respondent claimed that he knew nothing of the union's proposal. (Rec. 77).

If these facts are kept in mind, it is hardly conceivable how the State Supreme Court could arrive at the conclusion that the union conduct was coercive, unless that conclusion was based upon the absence of a direct employer-employee relationship which made the picketing, in the State Supreme Court's opinion, coercive *per se*. The facts demonstrate clearly a complete absence of any coercion whatsoever. They show that collective bargaining negotiations were carried on by the parties, and that the union was primarily

interested not in the acquisition of new members but in the payment of adequate wages to employees who performed the same type of work as union men did in the same locality; in other words the union attempted to reach a uniform wage rate to be paid for the same type of work to union workers and non-union workers alike, so as to prevent the depressive effect of lower wage rates upon the higher wage scales paid to union members. That this was the primary purpose of the union activities in the instant case is best evidenced by the fact that from the very beginning, at the meeting called by the state conciliator, the union wanted to discuss only wages and working conditions with the respondent, but was thwarted therein by the stubborn refusal of respondent's representative to do so. (Rec. 106).

The low wages paid by the respondent to his employees were hurting the union members. (Rec. 113). The respondent paid to his employees 55 cents an hour or $26 for a forty-eight hour work week (Rec. 112). Wherever union members went to find employment, the low wage rates paid by respondent were held against them. (Rec. 112). Union members, previously employed with the housing authority were paid 85 cents an hour, had a forty-hour work week and were paid time and one-half for overtime and holidays, and received paid vacations and sick leave. They had to take jobs at much lower pay rates, and inferior working conditions were forced upon them by the fact that respondent paid only 50 or 55 cents an hour to his employees, had a forty-eight hour work week, and no provisions for overtime, paid vacations and sick-leave. (Rec. 112).

Later on, when the union submitted the new proposal, it dropped any request that existing employees should join the union, but demanded that the *same wages should be paid to union and non-union employees alike* and that the

union be the bargaining agent for both. As said before, it is hardly understandable that under these conditions the picketing by the union should be branded as coercive and designed to force the respondent to compel his employees to join the union. A realization of these facts will show the obvious and apparent purpose for which the union was picketing the respondent's place of business;—that purpose was to inform the public that respondent's hotel was a business enterprise which refused to pay union wages to its employees, that the working conditions of union members were gravely injured by respondent's practices and that union members or persons sympathetic to the cause of union men should take notice of these facts. What the respondent really complained of was not any coercion which the union supposedly exercised upon him, but the publicity which he received. He wanted the courts to help him to keep the facts of a labor dispute and especially of his inferior working conditions secret so that union members should frequent his place—union members who, if they knew the truth, might not patronize his place. Yet, there is "no legal right to force the union to keep the facts (of a labor dispute) secret." (Cunningham, J., in *Truax* v. *Bisbee Local No. 380,* 19 Ariz. 379, 389, 171 P. 121, 125 (1918)).

The following words spoken by the Illinois Appellate Court in *Schuster* v. *Int. Association of Machinists,* 293 Ill. App. 177, 193, 194 (1937) fit perfectly the present case:

> "While plaintiff complains about the presence of the pickets that alternated in front of his place of business, his real complaint unquestionably is against the publicity given by the signs carried by them proclaiming the truth as to the *unfairness* of his attitude toward organized labor. He persists in his refusal to deal with a labor union and yet he resents as an infringement of his rights, the disclosure by that union to the public, including members of labor unions and their

sympathizers, of his antagonism to organized labor. His position, that, notwithstanding his antagonism to the union, the law must silence the voice of organized labor lest he may suffer any ill consequences as a result of his attitude, is untenable. It is, of course, his right and privilege to refuse to deal with the union and to operate a non-union shop, but, in our opinion, it is just as much the right and privilege of the union, when he so refuses, to publish the fact that it regards him as unfair to it. What inalienable right has an employer who is unfair in the eyes of organized labor to the favor of the continued patronage of its members and friends?''

The respondent places reliance upon the National Labor Relations Act and declares that the State of Washington has adopted the federal labor policy. That statement is plainly incorrect, since no labor relations act providing for a regulated process of collective bargaining has been adopted and is in existence in the State of Washington. Decisions rendered under the National Labor Relations Act have no bearing upon the present case. Besides, the opinion of the State Supreme Court made no such claim as set forth by the respondent, and in no way relied upon the National Labor Relations Act. It should also be pointed out that the National Labor Relations Act cannot find application in the present case, since the business to which the dispute pertained was not an enterprise where any labor dispute would affect interstate commerce, the National Labor Relations Board having persistently refused to assert jurisdiction over hotels. (See *Matter of White Sulphur Springs Company*, 85 N. L. R. B. No. 228.)

Besides, neither party ever contended that Gazzam's business was subject to the National Labor Relations Act; therefore decisions based on that statute are inapplicable to the case at bar.

Respondent's claim that the policy adopted by the Washington State Supreme Court is the same as the federal policy is also incorrect in other ways. The State Supreme Court based, in the present case, its decision partly upon the public policy statement of the Washington Labor Disputes Act and declared that this statement prohibits any picketing of a business by a union which has no members among the employees of the picketed employer. It is interesting to note that the Washington Labor Disputes Act, whose policy statement was thus interpreted by the State Supreme Court, is completely identical with the Norris-LaGuardia Act. Both acts contain the same definition of the term "labor dispute." In both acts the term "labor dispute" includes "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee*" (emphasis supplied). Rem. Rev. Stat. Sec. 7612-13. The State Supreme Court ignored in its opinion the positive command of the Act, that it is not necessary for a labor dispute under the Act, that the disputants stand in the proximate relation of employer and employee to each other.

This Court, in interpreting the public policy statement of the Norris-LaGuardia Act has reached just the contrary result as was reached by the State Supreme Court. Thus, in *Lauf* v. *E. G. Shinner & Co.*, 303 U. S. 323, 58 S. Ct. 578, 82 L. Ed. 872 (1938), an outside union had made demand upon the employer to require its employees, as a condition of their continued employment, to become union members; when this demand was refused, the union began to picket the employer's plant. This Court reversed

the injunction decree of the lower court and declared with respect to the public policy statement as follows:

> "The Court of Appeals erred in holding that the declarations of policy in the Norris-LaGuardia Act and the Wisconsin Labor Code to the effect that employees are to have full freedom of association, self-organization, and designation of representative of their own choosing, free from interference, restraint, or coercion of their employers, put this case outside the scope of both acts, since respondent cannot accede to the petitioners' demands upon it without disregarding the policy declared by the statutes * * *. *We find nothing in the declarations of policy which narrows the definition of labor dispute as found in the statutes. The rights of the parties* and the jurisdiction of the federal courts *are to be determined according to the express provisions applicable to labor disputes as so defined.*" (Emphasis supplied.)

The conduct involved in the present case is lawful under the standards established by this court.

The respondent admits in his brief, upon the basis of *American Federation of Labor* v. *Swing*, 312 U. S. 321 (1941), that picketing in the absence of a direct employer-employee relationship between union members and employer does not create unlawfulness. Since, however, the State Supreme Court based the alleged unlawfulness of the union's conduct upon the absence of a direct employer-employee relationship (Rec. 15, 16, 21, 23), respondent's admission actually disposes of his entire argument and thereby of the case. Yet, the respondent claims that the State Supreme Court rested its decision not upon the absence of a direct employer-employee relationship but upon the alleged attempt of the union "to compel respondent to coerce his men" (Resp. Brief, p. 23) to join the

union. To support his argument, respondent points to the State Court's decree which enjoins the defendants and each of them "from endeavoring to compel plaintiff to coerce his employees to join the defendant union or to designate defendant union as their representative for collective bargaining" (Resp. Brief, pp. 30-31). Respondent claims that a differentiation must be made between picketing for unionization and picketing to compel an employer to force his men to join the union.

Respondent is silent as to how such a differentiation could be made; but an analysis of the decree in this case will reveal that no line of demarkation is drawn between these two types of picketing. The plain fact is that, under the Court's decree, whatever types of picketing were to be carried out by the union would be in violation of the decree. The respondent could say in each and every instance of picketing that it was designed to coerce him to force his employees to join the union. It is not the form of the decree which is controlling but the substance—the effect of the decree; and the effect of the present decree is such as to impose upon the union as unlimited a restraint upon picketing, and thereby upon freedom of speech, as was imposed by the Illinois Supreme Court in the *Swing* case. Any type of peaceful communication is prohibited under this decree, particularly if those provisions of the decree are kept in mind which prohibit the union to coerce the employer "*by urging and persuading* others to withhold their patronage from the plaintiff * * *." (Emphasis supplied.) (Rec. 39.) But justifiable conduct by a union cannot be turned into coercion by labeling it as such. The fact that the picketing and the attendant publicity is designed to influence the respondent in his attitude is a far cry from coercion. Publicity is always designed to influence people, but that does not make it coercive; neither

oes it become coercive by calling it so. If an eventual ss or gain which might follow every peaceful communi-tion, were to be made the criterion, as to whether a com-unication is lawful or unlawful, then indeed the right of eedom of speech could be destroyed at the will of the arty against whom the speech is directed. This Court as repeatedly declared that the influence which a union ttempts to exercise upon an employer through the at-nding publicity of picketing, cannot be deemed coercive nd, thereby, unlawful. Thus, in *Senn* v. *Tile Layers Pro-ctive Union, Local No. 5*, 301 U. S. 468 (1937), 57 S. Ct. 57, 81 L. Ed. 1229, where a union demanded that Senn, n employer, as well as his employees should join the nion and Senn as well as his employees refused to do so, e ensuing picketing was held lawful, this Court saying:

> "The sole purpose of the picketing was to acquaint the public with the facts and, by gaining its support, *to induce Senn to unionize his shop. There was no effort to induce Senn to do an unlawful thing.* There was no violence, no force was applied, no molestation or interference, *no coercion.* There was only the persuasion incident to publicity.
>
> "The unions acted, and had the right to act as they did, to protect the interests of their members against the harmful effect upon them of Senn's action. Compare *American Steel Foundries* v. *Tri-City Central Trades Council, supra,* 257 U. S. 184, 208, 209, 42 S. Ct. 72, 78, 66 L. Ed. 189, 27 A. L. R. 360. *Because his action was harmful, the fact that none of Senn's employees was a union member, or sought the union's aid, is immaterial.*" (Emphasis supplied.)

It should be noted that the alleged "coercion" which as exercised by the union upon the employer in the *Senn* se was by far greater than the averred "compulsion" the present case. In the *Senn* case the union requested

Senn to sign an agreement which provided not only that all of his employees should become union members but also that he himself should join the union. Failing to do so, he would be barred from performing work with his own hands. The picketing of the union was held not coercive. In the instant case the union engaged in negotiations with the employer and requested ultimately only that union wages should be paid to the employees, and that the union should be the bargaining agent (Rec. 14-15). When the employer refused to agree upon even a single point with the union, it commenced to picket the place. Surely, such picketing cannot be held coercive.

In the case of *American Federation of Labor* v. *Swing*, 312 U. S. 321, 61 S. Ct. 568, 83 L. Ed. 855 (1941), the facts as stated in the opinion of the Illinois State Supreme Court (*Swing* v. *American Federation of Labor*, 372 Ill. 91, 92, 93, 22 N. E. (2d) 857) are characteristic, and warrant restating. Officials of the Hairdressers Union called upon Swing, an employer, and

> "* * * demanded that he require all of his employees to join that union, to which none of them belonged, and to which none of them wished to belong. Swing took a neutral position in the matter, permitted the agents to mingle with his employees, and permitted the employees to do as they pleased. The plaintiffs all agree that there was not then and has not since been any labor difficulty or dispute; the employees were and are satisfied with wages, hours and working conditions. Notwithstanding these satisfactory conditions and obvious harmony among the plaintiffs, the place of business where they all obtained a livelihood was beset by pickets. * * * It is also charged and admitted that all of these pickets were strangers to the employer, that none of them were either past or prospective employees in the place of business and that the entire proceeding was designed and intended

to force the employer to force his employees to join that particular union, or in the alternative suffer a destruction of his business, with a consequent loss of employment means of livelihood to all of the plaintiffs. The Appellate Court succinctly states: The question presented for determination is whether a labor union, in which none of its members are present, past or expectant employees of an employer, has a right to picket his place of business for the purpose of compelling the employees, who do not wish to join a union, to do so."

Those are the facts as stated by the Illinois Supreme Court in the *Swing* case. The decision which the Illinois Supreme Court rendered, based upon the facts as found by it, is well known; it affirmed the injunctive decree of the Illinois Appellate Court. In doing so, it declared (372 Ill. 96):

"We have before us in this case an effort by force to deprive all of the plaintiffs of their means of livelihood and compel them to exist on terms prescribed by others without lawful authority to prescribe them."

From these facts it is clear that the Illinois Supreme Court rested its decision solely *upon the alleged coercion* in which the union engaged when it picketed Swing's place of business and requested him to have his men join the union, and he and his employees declined to do so and combined in a suit against the union.

This court did not recognize the union conduct in the *Swing* case as coercive, but reversed the decision of the Illinois Supreme Court stating that "such a ban of free communication is inconsistent with the guarantee of freedom of speech."

The respondent tries in his brief to obviate the apparent legal consequences of the *Swing* case upon his argument by stating that there was in the *Swing* case no union

activity to coerce the employer to violate a state statute and that the *Swing* case, therefore, does not lend any weight to petitioners' point of view. It is, of course, completely immaterial whether a state court bases its decision upon an alleged violation of the common law of a state or a state statute; if such a decision, however arrived at, infringes upon constitutionally guaranteed rights, it is invalid and will be reversed by this Court, and it does not make any difference, whether it was based upon a statute or the common law. Moreover, the responden forgets that the Washington State Supreme Court declared in the present case just as the Illinois Supreme Court did in the *Swing* case, that the union's conduct was coercive and violated the common law of the state and that the public policy statement of the Washington Anti-Injunction Act was only declaratory of the common law. However, the best answer to respondent's argument was provided by this Court in the *Swing* case itself, when it said:

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state." (312 U. S. 326.)

The respondent also attempts to distinguish the *Swing* case from the present one by contending that Gazzam, contrary to Swing, was a completely innocent and neutral bystander and that "a state court injunction to prevent damage to the business of this law-abiding, innocent and neutral bystander, cannot be deemed a violation of any union right protected by the federal constitution" (Resp. Brief, p. 29). The facts in this case show that Gazzam was neither innocent nor neutral, but tried by all means at his disposal to keep the union out of his place. As mentioned before, the gist of his complaint is not the dispute, but the publicity which he received through the dispute.

This Court reiterated its previous stand in the case of *Bakery and Pastry Drivers and Helpers Local 802 of I. B. T.* v. *Wohl*, 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178 (1942), to the effect that peaceful picketing by a union, designed to bring some pressure upon an employer, is not coercive and is, therefore, lawful. In the *Wohl* case, the union picketed the suppliers of peddlers of bakery goods for the purpose of inducing the suppliers to abandon the peddler system or, at least, to induce the peddlers to become union members and thereby to work only six days a week and to hire a union helper. This Court in reversing the injunctive decree of a New York state court, recognized that the picketing engaged in by the union was protected by the right of freedom of speech, and did not consider the pressure which was exerted by the union on the employer as coercion.

In *Cafeteria Employees Union, Local 302, et al.* v. *Angelos, et al.*, 320 U. S. 293, 64 S. Ct. 126, 88 L. Ed. 58 (1943), this Court had to determine the legality of peaceful picketing which was carried out by members of a union against owners of a cafeteria who conducted the business by themselves without the aid of any employees. The picketing by the union obviously was designed to influence the cafeteria owners by the pressure of publicity, to employ union members to do the job which was performed by the proprietors themselves. This Court reversed the decision of the New York State Court and declared the picketing as being protected by the right of freedom of speech. Obviously, the picketing was not deemed coercive.

All of the above cases, decided by this Court, demonstrate clearly that the peaceful pressure of publicity, brought by a union to bear upon an employer to influence him in his attitude with respect to demands of the

union pertaining to wages and working conditions, will not be deemed coercive but will be protected by this Court under the guarantee of freedom of speech.

The respondent relies heavily upon the case of *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 649 (1949). That case, however, does not help respondent's argument. In the *Giboney* case the picketing employed by the union was part and parcel of a "single and integrated course of conduct" designed and engaged in to violate a valid, existing, criminal statute. The protection of peaceful picketing as a means of communication under the right of freedom of speech was not disapproved of but expressly upheld; only the use of picketing in the particular case as a means "to violate valid laws designed to protect important interests of society" was condemned. In the present case the picketing was not part and parcel of an integrated scheme to violate a valid state law; it was standing alone—isolated from any unlawful scheme. It was carried out for the sole purpose of informing the public of a labor dispute.

In the *Giboney* case, the union men "were doing more than exercising a right of free speech or press." In the present case, the union was exercising only these rights and nothing more. No law "designed to protect important interests of society" was violated in the instant case —just the contrary. The most important interests of society demand the granting of a very broad scope to the right of freedom of speech. Contrary to the *Giboney* case, the conduct of the union in the present case was not directed against and injurious to the interests of the whole public, but, at best, was merely annoying to the respondent. Yet, "states cannot consistently with our Constitution abridge * * * [the] freedoms [of speech and press] to obviate slight inconveniences or annoyances. *Schneider*

v. *State*, 308 U. S. 147, 162; 60 S. Ct. 146, 151, 84 L. Ed. 155." (*Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490; 69 S. Ct. 684, 93 L. Ed.)

As mentioned repeatedly, this Court has declared that efforts by a union to enlarge the membership of its organization are directed towards a lawful objective, and that peaceful picketing designed to spread information among the public with respect to that objective is protected by the right of freedom of speech. Important interests of the public demand such a dissemination of information." It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." (*Thornhill* v. *State of Alabama*, 310 U. S. 88 (1940).)

Respectfully submitted,

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